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No. 89-1633

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

CECIL ARNOLD ODOM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court, upon determining that it was manifestly necessary to discontinue a joint trial because one co-defendant, contrary to the court's directions, persisted in introducing matters prejudicial to another co-defendant without regard to their relevance, had discretion to decide which defendant's trial would continue before the empaneled jury and which defendant's case would be severed for trial before a different jury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A58) is reported at 888 F.2d 1014. The opinion of the district court is reported at 724 F. Supp. 387.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1989. A petition for rehearing was denied on January 24, 1990. Pet. App. A59-A74; 895 F.2d 928. The petition for a writ of certiorari was filed on April 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted by a federal grand jury sitting in the District of Maryland and charged with murdering a federal witness, in violation of 18 U.S.C. 1512 and 1513, conspiring to murder a federal witness, in violation of 18 U.S.C. 1515, and using a firearm in a crime of violence, in violation of 18 U.S.C. 924(c). Petitioner and a co-defendant went to trial together, but during trial the court granted the co-defendant's motion for a severance from petitioner. Although petitioner wished to proceed with the trial and have his co-defendant retried before another jury, the court ordered a new trial for petitioner and allowed his co-defendant's trial to proceed with the existing jury. Petitioner subsequently moved to dismiss the indictment on double jeopardy grounds. The district court denied the motion. 724 F. Supp. 387 (D. Md. 1988). Petitioner then took a pretrial appeal, and the court of appeals affirmed. Pet. App. A1-A58.

1. Leon Vitkauskas, a government witness, was murdered in June 1987. Vitkauskas had been scheduled to testify against Dale Benjamin, Sr., and Dale Benjamin, Jr., at their trial for theft of an armored car. In February 1988, Dale Benjamin, Sr., Victor Fincham, and Cleveland "Reds" Miller were indicted for conspiracy to murder and other crimes relating to the killing of Vitkauskas. Petitioner was not charged in that indictment. The prosecution contended that Benjamin and Fincham hired Miller to kill Vitkauskas. During the trial, Fincham moved for a severance on the ground that Benjamin's defense and his own were irreconcilably antagonistic and inconsistent. The district court granted Fincham's motion, severed Fincham's case, and proceeded with the trial of Benjamin and Miller. The jury acquitted Benjamin but convicted Miller. Pet. App. A4-A6.

Following his conviction, Miller elected to cooperate with the government. Miller told investigators that petitioner was

"fully involved" in the planning of the crime, that he paid Miller for carrying out the killing, and that he accompanied Miller on the victim's "last ride." Pet. App. A6-A7. In July 1988, the grand jury returned a superseding indictment charging Fincham and petitioner with various crimes, including murdering a federal witness and conspiring to murder a federal witness.

2. Prior to trial, Fincham moved for a severance in anticipation that he and petitioner would have antagonistic defenses. Fincham's motion was denied, subject to reconsideration as the trial developed. Pet. App. A7. The district court established "ground rules" to prevent prejudicial information from being introduced by one defendant against another. *Id.* at A7-A8. Although petitioner's counsel was admonished by the court on several occasions, he refused to abide by the ground rules. Instead, the "attorney's tactic was to bring out any information that was detrimental and prejudicial to Fincham without regard to whether such information was relevant to the charges contained in the indictment." [1] *Id.* at A15. Fincham renewed his motion for a severance after petitioner's opening statement, and on several occasions thereafter; on the morning of the third day of trial, the district court concluded that in light of petitioner's persistent attacks on Fincham, a severance was necessary to protect Fincham's right to a fair trial.

Both the government and petitioner opposed Fincham's severance motion. When the court granted the motion, petitioner and Fincham asked that Fincham's case be severed and petitioner's trial allowed to proceed before the im-

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[1] In his opening statement, petitioner's counsel disregarded the district court's prior ruling that evidence of illegal drug activity was inadmissible and told the jury that a bar owned by Fincham "was a hotbed of narcotics." Gov't C.A. Br. 6. Petitioner's counsel also sought to elicit testimony that a government witness had engaged in firearms dealings with Fincham. *Ibid.*

paneled jury. The government asked that Fincham's trial proceed in order to avoid a second mistrial in his case. The district court, reasoning that petitioner "should not * * * benefit from a situation which was of his own making," 724 F. Supp. at 389, ordered that petitioner's case be severed for trial before another jury, and proceeded with the trial of Fincham. The jury convicted Fincham.

3. The district court denied petitioner's motion to bar a second trial on double jeopardy grounds. 724 F. Supp. at 388. The court questioned whether the "manifest necessity" standard of *Arizona* v. *Washington*, 434 U.S. 497 (1978), applies where one co-defendant's case is severed. 724 F. Supp. at 389. In any event, the court held, it was manifestly necessary to discontinue the joint trial in this case. Petitioner's counsel had sought to "manipulate the trial process for the purpose of obtaining tactical advantage." *Ibid.* Counsel's tactics threatened to cause undue prejudice to petitioner's co-defendant and "made continuation of a joint trial clearly impossible." *Ibid.* The district court also rejected petitioner's motion to preclude the government from using any evidence that it had developed since the first trial. *Ibid.*

4. The court of appeals affirmed. The court recognized that "[t]he attack of [petitioner's attorney] upon the co-defendant Fincham was so unrelenting and prejudicial that Fincham could not have received a fair trial as a co-defendant and before the same jury as [petitioner]." Pet. App. A14. Accordingly, the court held that the district court acted within its discretion in granting a severance. *Id.* at A15.

The court of appeals further held that the court's decision to continue Fincham's trial and sever petitioner's case for retrial before a different jury was within its discretion and did not violate the Double Jeopardy Clause. The court observed that the trial court's choice between the two defendants, like the decision to grant a severance, "falls in

an area where the trial judge's determination is entitled to great respect." Pet. App. A21. The court of appeals rejected petitioner's argument that the Double Jeopardy Clause imposes a "two-tiered" manifest necessity test in multi-defendant trials. *Id.* at A25. The court observed that the manifest necessity test was developed in the context of single-defendant trials. In the context of joint trials, the court concluded, "the choice of whom to sever is a question of discretion, to be reviewed only for abuse, not by a second application of the extremely stringent manifest necessity test." *Id.* at A26.

The court then held that there was no abuse of discretion in this case. Although "the conduct of [petitioner's] attorney did not amount to misconduct," that lawyer's defense strategy was "designed to prejudice * * * Fincham by use of evidence, statements, and innuendos about his past * * *." Pet. App. A23. The court concluded that, where a severance is necessitated by tactics employed by a defendant's own lawyer, the district court has discretion to sever that defendant's case. *Id.* at A26-A27. The court summarily rejected petitioner's contention that the government should be precluded from using in petitioner's retrial any evidence developed since his first trial. *Id.* at A27.

Judge Murnaghan dissented. He agreed with the majority that "[i]t does not seem open to serious question whether some severance should have been granted," and he agreed that the situation "necessitated * * * a continuation before the same jury for one [defendant], and retrial for the other." Pet. App. A33. But Judge Murnaghan concluded that the district court had no discretion to sever petitioner's case, because only petitioner's co-defendant had moved for a severance and thereby consented to retrial before a second jury. Thus "it was not manifestly necessary to sever [petitioner]," and the Double Jeopardy Clause mandated severance of petitioner's co-defendant. Pet. App. A42.

Judge Murnaghan also filed an opinion dissenting from the denial of rehearing en banc. *Id.* at A62-A74.

Petitioner subsequently was tried and convicted, Pet. 21, but sentence has not yet been imposed. The petition in this case is from the court of appeals' ruling on the interlocutory appeal.

ARGUMENT

Petitioner contends (Pet. 22-30) that the manifest necessity standard applies not only to the district court's decision whether to grant a severance in the course of a multi-defendant trial, but also to the trial court's determination of which co-defendant's case to sever for trial before a different jury. The court of appeals correctly held that the second decision is reviewable only for abuse of discretion.

1. The double jeopardy principles that govern this case are summarized in *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978):

> Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused. Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor * * * must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant.

The Court recognized in *Washington* that the question whether prejudicial remarks by a defendant's lawyer require mistrial "falls in an area where the trial judge's determination is entitled to special respect" from reviewing courts. *Id.* at 510.

Petitioner does not dispute that it was manifestly necessary to discontinue the joint trial in this case. Nor does he deny that the need for a severance arose because his own counsel disregarded the district court's directions and injected into the trial information prejudicial to petitioner's co-defendant without regard to whether the information was relevant to the charges being tried. It thus is undisputed that petitioner's trial tactics made it impossible to continue the joint trial without prejudicing petitioner's co-defendant. See Pet. App. A15.

2. Petitioner nevertheless contends that it was not manifestly necessary to sever his case, and that the manifest necessity standard applies not only to the decision whether to grant a severance, but also to the determination as to which co-defendant's case to sever in a multi-defendant trial. This novel argument is without merit, for several reasons.

First, the rule petitioner proposes could lead to absurd results. In many cases it may be manifestly necessary to terminate a joint trial, but not manifestly necessary to terminate the trial of any particular defendant. If petitioner's view were adopted and the manifest necessity standard were applied to each individual defendant in such cases, an impossible situation would result: continuation of the joint trial would be prohibited, but retrial of any of the defendants would be barred by the Double Jeopardy Clause. At a minimum, adoption of petitioner's proposed rule would invite endless litigation over whether severance of one co-defendant's case was "more necessary" than severance of another co-defendant's case. See *Washington*, 434 U.S.

at 506 ("[C]ontrary to the teachings of Webster, we assume that there are degrees of necessity."). [2]

In addition, petitioner's suggested rule would create an incentive for co-defendants to engage in strategic behavior to defeat the rule that defendants may be charged and tried jointly "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P. 8(b). In this case, for example, petitioner adopted trial tactics that would have resulted in undue prejudice to his co-defendant, and then attempted to take advantage of that strategem by insisting that the court sever his co-defendant's case. Such tactics, even if they do not rise to the level of impropriety, should not be rewarded. Requiring the defendant to undergo a second trial in "th[e]se circumstances do[es] not * * * create unfairness to the accused." *Washington*, 434 U.S. at 505.

Finally, the determination to sever one co-defendant's case rather than another's, like the decision to grant a severance, "falls in an area where the trial judge's determination is entitled to special respect." *Washington*, 434 U.S. at 510. The district judge is in the best position to consider the various possibilities and weigh the relative harm to the co-defendants and the public interest. In this case, the district court took

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[2] Judge Murnaghan recognized this dilemma in his opinion dissenting from the panel decision below, but he did not suggest a solution, nor does petitioner. Judge Murnaghan stated simply that if both petitioner and his co-defendant had insisted that the trial continue, the "defendant's valued right to have his trial completed by a particular tribunal [would not] have to be subordinated to the public's interest in fair trials designed to end in just judgments." Pet. App. A48 (quoting *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949)). Judge Murnaghan did not explain how the manifest necessity standard would permit the severance of one defendant's case rather than another's in this situation, or indicate which defendant's wishes should be respected.

into consideration (1) that petitioner's counsel had "provoked" the mistrial and that petitioner should not "benefit from a situation which was of his own making"; (2) that neither defendant had yet been prejudiced by petitioner's trial tactics; and (3) that a second severance of Fincham's case might lead to a public perception that Fincham was "beating the system." 724 F. Supp. at 389. Such complex judgments call for the exercise of the trial court's sound discretion rather than the application of a rigid manifest necessity standard.[3]

3. Petitioner does not suggest that the courts of appeals are in conflict over the question presented. On the contrary, petitioner concedes that "the situation presented here is unique in former jeopardy cases." Pet. 23. Only one other court of appeals has considered the issue, and that was in a case in which the defendant did not move for a severance, but apparently did not object to the severance when it was granted. See *United States* v. *Aguiar*, 610 F.2d 1296 (5th Cir), cert. denied, 449 U.S. 827 (1980). The Fifth Circuit in that case agreed with the position taken by the Fourth Circuit in this case, holding that "[i]n light of the principles of *Arizona* v. *Washington*, once severance is found to be

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[3] We do not suggest that petitioner's expressed preference to be tried before the impaneled jury was irrelevant to the choice between petitioner and his co-defendant. Cf. *United States* v. *Dinitz*, 424 U.S. 600 (1976) (consent is relevant to the double jeopardy analysis). But where, as here, defense counsel chooses to employ tactics that necessitate a severance, the district court should have discretion to consider the public interest as well as the defendant's preferences. The fact that petitioner did not seek a severance "is simply one of many factors that properly entered the district court's decision." *United States* v. *Aguiar*, 610 F.2d 1296, 1301 (5th Cir.), cert. denied, 449 U.S. 827 (1980).

Petitioner is wrong in suggesting (Pet. 25) that the district court based its decision on the "convenience of the prosecution." The district court considered a variety of factors, including the government's expressed concern that a second mistrial in Fincham's case was not in the public interest. See 724 F. Supp. at 389.

warranted by manifest necessity, the trial court has sound discretion over who is to be retained and who is to be severed." 610 F.2d at 1301. Because the issue is not one that arises with any frequency, and because it has not provoked any disagreement among the courts of appeals or a conflict with any of this Court's decisions, review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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